Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

UNITED STATES ex rel., JOSEPH HAMPTON,

Petitioner,

v.

GEORGE DETELLA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID E. CAMIC
Counsel of Record
CAMIC, JOHNSON, WILSON
& McCULLOCH
546 West Galena Boulevard
Aurora, Illinois 60506
(630) 859-0135

Counsel for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

QUESTION PRESENTED FOR REVIEW

Whether an explicit waiver of the Constitutional right to closing argument as guaranteed by due process of law, the Sixth Amendment, and this Court's opinion in *Herring v. New York*, 422 U.S. 853 (1975), can be found based solely on a trial court's statement at a hearing at post-trial proceedings that Petitioner's attorney said at some other time after trial, and not on record, that Petitioner did not want closing argument, in direct conflict with this Court's opinion in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that "an intentional relinquishment or abandonment of a known right" must be shown before waiver will be found.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph Hampton, respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review that court's judgment and opinion entered on July 6, 2000 denying Petitioner's petition for writ of habeas corpus, and its order entered on August 8, 2000 denying Petitioner petition for rehearing with suggestion for rehearing *en banc*.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit issued its opinion on July 6, 2000. *Hampton v. Detella*, No. 98-3897 (7th Cir. 2000). This decision is reprinted in the appendix to this petition. On August 8, 2000, that court denied Petitioner's petition for rehearing with suggestion for rehearing *en banc*. That order is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals entered its order denying Petitioner's petition for writ of habeas corpus on July 6, 2000. Petitioner filed a timely petition for rehearing with suggestion for rehearing *en banc* on July 20, 2000. That petition was denied by the court on August 8, 2000. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c) since Petitioner seeks discretionary review of an order of the United States Court of Appeals for the Seventh Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution – Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [,] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner, along with a co-defendant, Jayme P. Sebers, was charged in the Circuit Court of Kendall County, with multiple counts of attempted murder, armed robbery, and aggravated battery. The two waived their rights to a jury trial and on August 20, 1991, pleaded guilty to the charges and were sentenced. They both filed motions to withdraw their guilty pleas and to vacate the convictions, which were denied. In separate appeals, the Illinois Appellate Court reversed the orders denying the motions to withdraw the guilty pleas and ordered that the defendants be allowed to enter new pleas. See *People v. Hampton*, 620 N.E.2d 3 (Ill. App.2d Dist. 1993).

On remand, both defendants pled not guilty and requested that the court allow them to reinstate their jury demands, which the court denied. The case proceeded to a bench trial and both were found guilty. Hampton was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count, for a total of 90 years impris-

onment, with a concurrent term of 10 years for aggravated battery.

Hampton appealed, raising the following issues: (1) he was denied his right to defend against the charges when the trial judge declared him guilty without affording him an opportunity to present closing argument; (2) the court erred when it denied him the opportunity to present closing argument; (3) the court erred in determining that his sentence for armed robbery must be served consecutive to his sentence of attempted murder; and (4) the court abused its discretion in sentencing him to consecutive extended-term sentences totaling 90 years imprisonment. On April 1, 1996, the Illinois Appellate Court denied Hampton's appeal. Hampton filed a timely leave to appeal to the Illinois Supreme Court which was denied on October 2, 1996. He then filed a petition for writ of certiorari to this Court, which was denied on March 31, 1997.

Co-defendant Sebers filed a separate appeal and on March 3, 1997, the appellate court reversed the trial court's denial of Sebers' request for a jury trial, and remanded the case to the pleading stage. On June 4, 1997, the Illinois Supreme Court denied the state's petition for leave to appeal the decision with regard to Sebers.

On November 12, 1997, Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Illinois raising two claims: (1) he was denied due process of law and his Sixth Amendment right to counsel when the state court declared him guilty without allowing him to present a closing argument; and (2) he was denied his equal pro-

tection rights when the appellate court reversed Sebers' conviction on the basis that the trial court had erred in denying his request for a jury trial.

The district court denied Petitioner's habeas corpus petition, and on November 11, 1998 granted a certificate of appealability as to the first claim. The Court of Appeals for the Seventh Circuit agreed that Petitioner had not procedurally defaulted the claim and addressed it on the merits. The court then affirmed the denial of Petitioner's petition for writ of habeas corpus, finding that Petitioner waived his right to make closing argument based on the trial court's statement at a hearing on Petitioner's post-trial motion allegation that the court erred in failing to allow opening statements and closing arguments, that:

> "As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . ."

The court found that that statement by the trial court was an explicit waiver of Petitioner's Constitutional right to present closing argument and denied Petitioner's habeas corpus petition. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc, and on August 8, 2000, the court denied the petition for rehearing with suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT INCORRECTLY FOUND THAT AN "INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT," SPECIFICALLY THAT OF THE CONSTITUTIONALLY GUARANTEED RIGHT TO CLOSING ARGUMENT, CAN BE SHOWN SOLELY ON THE BASIS OF THE TRIAL COURT'S STATEMENT AT THE HEARING ON THE PETITIONER'S POST-TRIAL PROCEEDINGS THAT PETITIONER'S COUNSEL SAID AT SOME UNSPECIFIED TIME AFTER THE TRIAL AND NOT ON THE RECORD, THAT PETITIONER'S COUNSEL DID NOT WANT CLOSING ARGUMENT WITHOUT ANY INQUIRY OF THE PETITIONER REGARDING HIS RIGHT TO PRESENT ARGUMENT.

The United States Court of Appeals for the Seventh Circuit in this case found that there was an adequate waiver of closing argument based solely on the trial court's, whose actions were being called into question, statement at the hearing on Petitioner's post-trial proceedings that at some time after trial, and not of record, Petitioner's counsel said that Petitioner did not want closing argument. The Court of Appeals also suggested the burden was on Petitioner to show counsel did not make such a statement. This is in direct conflict with this Court's expression that "an intentional relinquishment or abandonment of a known right must be shown before waiver will be found." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is also directly contradictory of this Court's reluctance to find waiver unless expressly made. In the face of such glaring dismissal of this Court's well-established rule of the law

applicable to waiver, this Court should reaffirm said rulings.[1]

In this case, following Petitioner's bench trial, the State trial court immediately declared Petitioner guilty after ruling on a motion, without affording counsel the opportunity to argue or request to argue or to present closing argument. The trial court never inquired of the Petitioner, Joseph Hampton, of his desire to have argument. The State appellate court found that Petitioner waived the issue by failing to request argument. The District Court in this case found that that was error, because a Petitioner cannot waive his right to present closing argument without a meaningful opportunity to request argument or object. However, the District Court, following supplemental arguments, found explicit waiver based on the following statement of the trial court at a post-trial proceeding:

> "As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . ."

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[1] This Court should also grant certiorari since courts are finding waiver of this fundamental constitutional right based solely on silence. See *United States v. Davis*, 993 F.2d 62, 65 (5th Cir. 1993).

The United States Court of Appeals for the Seventh Circuit agreed and added that Petitioner had not shown that the trial court's unsworn statement that Petitioner's counsel relinquished his right to closing argument was not correct. This finding by the United States Court of Appeals directly contradicts prior holdings of this Court, and certiorari should be granted to correct this potentially far-reaching and devastating departure from this Court's rulings.

The right to present closing argument is clearly established. *Herring v. New York*, 422 U.S. 853 (1975). Because "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process," a judge cannot deny defense counsel an opportunity for closing argument. *Herring*, 422 U.S. at 857. It is per se reversible error for the court to deny a defendant in a criminal trial the right to present closing argument. *Herring*, 422 U.S. at 856-65.

However, the *Herring* Court endorsed the proposition that the right to present a summation may be waived by quoting with approval the statement of a Maryland Court of Appeals in a previous case:

> "The Constitutional Right of a defendant to be heard through counsel necessarily includes the right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument . . ." *Yopps v. State*, 178 A.2d 879, 881 (Md. 1962).

The standard to be applied in determining the question of wavier as a matter of Federal Constitutional law is that it is incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Further, this Court has held that courts should indulge in every reasonable presumption against waiver (*Brookhart v. Janis*, 384 U.S. 1 (1966)), and they should not presume acquiescence in the loss of fundamental rights. *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). Whether waiver occurs should appear of record. *Johnson v. Zerbst*, 304 U.S. at 463.

While on previous occasions the Seventh Circuit has employed the correct Constitutional standard (*United States v. Spears*, 671 F.2d 991 (7th Cir.), the court is apparently straying far afield from requiring a waiver to be shown on the record, or explicitly. While the Seventh Circuit said it would have been "better" if there had been an explicit waiver, it did not require it. Furthermore, the court then found that it was Petitioner's burden to prove that waiver did not occur. This directly conflicts with a presumption against waiver. *Brookhart v. Janis*, 384 U.S. at 16. Because the Seventh Circuit Court's opinion is so directly contradictory of many of this Court's teachings, this Court should grant certiorari to "right the wrong" and reestablish these basic but important principles of Constitutional law.

CONCLUSION

For the aforementioned reasons, Petitioner, Joseph Hampton, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

DAVID E. CAMIC
Counsel of Record
CAMIC, JOHNSON, WILSON
& McCULLOCH
546 West Galena Boulevard
Aurora, Illinois 60506

Counsel for Petitioner

APPENDIX

App. 1

[Dated July 6, 2000]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3897

JOSEPH HAMPTON,

Petitioner-Appellant,

v.

GEORGE E. DETELLA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, No. 97 C 7885.
Honorable James B. Moran, Judge Presiding.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: ORDER:

Petitioner, Joseph Hampton and his co-defendant Jayme P. Sebers, were charged in the Circuit Court of Kendall County with multiple counts of attempted murder, armed robbery, and aggravated battery. They initially waived their right to jury trials and pled guilty, but subsequently moved to withdraw their guilty pleas and to vacate the conviction. The trial court denied their motions, but the Illinois Appellate Court reversed. On remand, they pled not guilty and asked the court to reinstate their jury demands. The court

refused to do so, and conducted a bench trial. According to Hampton (and unrebutted by the State), at the close of the trial the court ruled on a motion and then immediately declared them guilty without affording defense counsel an opportunity to request or present closing arguments. Hampton was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count, for a total of 90 years with a concurrent prison term of 10 years for aggravated battery.

After exhausting his state court appeals, Hampton filed a petition for a writ of habeas corpus, asserting two claims: (1) that he was denied due process of law and his Sixth Amendment right to counsel when the state court pronounced him guilty without affording him an opportunity to present a closing argument; and (2) he was denied equal protection when the appellate court reversed his co-defendant's conviction on the ground that the trial court erred in denying the request for a jury trial. The district court denied his habeas petition, and Hampton appeals only the first claim. We agree with the district court that Hampton did not procedurally default the claim, and thus turn to the merits.

In Herring v. New York, 422 U.S. 853, 858, 45 L.Ed. 2d 593, 95 S.Ct. 2550 (1975), the Supreme Court recognized that the opportunity to make closing argument is a basic element of the adversary fact-finding process in a criminal trial. In fact, the Court held that "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." Id. at 862. Accordingly, the Court held that it is per se re-

versible error for a trial judge to deny a defendant the opportunity to present a closing argument. Id. at 865. United States v. Spears, 671 F.2d 991, 992 (7th Cir. 1982). That right to present closing argument, however, may be waived. Id., citing Herring, 422 U.S. at 860. This appeal hinges upon the narrow issue of whether the defendant waived his right to closing arguments.

We will find waiver only if the record demonstrates "'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 993, quoting Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). The district court found such an intentional relinquishment on this record, and we agree. First, defense counsel never requested closing argument. This alone is not dispositive, because there was little time for reflections between the close of evidence and the finding of guilt. Nevertheless, the record indicates that the prosecutor interrupted the judge to inform the judge he had made a legal error in discussing the mental state required for an attempted murder conviction. That indicates an atmosphere in which a defense counsel could be expected to interrupt to raise something as important as the denial of closing argument. We would not, however, find waiver on that alone. But there is more. In paragraph 5 of a post trial motion, Hampton argued that the court erred in failing to allow opening statements and closing arguments. At a hearing on the motion, the trial court stated:

> As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's state-

> ments to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . .

That statement of fact by the trial court reveals an explicit waiver of closing argument by Hampton's defense counsel. Hampton provides no evidence casting doubt on the veracity of the court's statement. Instead, Hampton argues that the statement cannot support a finding of waiver because it was an unsworn statement made by the trial judge faced with an argument of trial error and appears to relate a statement by defense counsel that was made after the error occurred. We agree that the better practice would be to obtain the statement from counsel on the record. Nevertheless, we think that the statement could properly be considered by the trial court in determining whether Hampton waived closing arguments. Where a defense counsel does not request closing arguments but remains silent as the judge proceeds to enter a finding of guilt, the task for the court is to interpret that silence. The court must determine whether the silence constituted an acquiescence in proceeding without closing argument and thus an intentional relinquishment of it, or whether the defense counsel's silence reflected merely a lack of opportunity to timely object or an ignorance of the right to closing arguments. We have previously rejected efforts to constrict that interpretation through per se rules. In Spears, we refused to follow courts that considered silence, absent prejudice, to constitute a waiver, but we also declined to adopt the rules by other court's that closing arguments could never be waived by mere

silence. 671 F.2d at 994-95. Instead, we adopted an approach that considers all of the surrounding circumstances in making that determination. Here, the post-trial statement by defense counsel clarified to the trial court that the silence was intentional, and that Hampton's counsel "had no intention to ever make closing arguments." Although the trial judge identified three other parties to that conversation, Hampton has produced no evidence from any of them rebutting the trial court's recitation. Given the defense counsel's explicit acknowledgment that his silence reflected his intention to forego closing arguments, the trial court did not err in finding waiver. Accordingly, the decision of the district court is affirmed.

App. 6

[Dated August 8, 2000]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3897

JOSEPH HAMPTON,

Petitioner-Appellant,

v.

GEORGE E. DETELLA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, No. 97 C 7885.
Honorable James B. Moran, Judge Presiding.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: ORDER:

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by petitioner-appellant on July 20, 2000, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.